

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations,
(Atlantic and Glenwood, Iowa)

) MM Docket No. 94-122

)

) RM-8513

)

)

)

RECEIVED

APR - 3 1995

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

DOCKET FILE COPY ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**MOTION TO STRIKE AND RETURN AS UNACCEPTABLE
COMMENTS AND COUNTERPROPOSAL**

Stephen O. Meredith ("Mr. Meredith"), by and through counsel, hereby submits his Motion to Strike from this Docket the "Comments and Counterproposal" filed on December 19, 1994, by Wireless Communications Corp. ("Wireless"), in the above-captioned rulemaking proceeding. As an initial matter, it should be noted that the Notice of Proposed Rulemaking, 9 FCC Rcd 139 (1994) ("NPRM"), released by the Commission on October 26, 1994, lists the Docket Number as "93-286." However, the Commission's Record Image Processing System indicates that the Commission has changed the Docket number to "94-122," and that number appears in the caption. The Commission should return the Comments and Counterproposal to Wireless. In support whereof, the following is shown:

Standing

1. Wireless has proposed the allotment of FM Channel 293C3 to Atlantic, Iowa. Mr. Meredith is the permittee of KSOM(FM), Audubon, Iowa. KSOM(FM)

No. of Copies rec'd 4
List A B C D E

would compete for revenues with any new FM station that would be allotted to Atlantic, Iowa. Therefore, Mr. Meredith has the requisite standing to challenge Wireless' Comments and Counterproposal. See, Sanders Brothers, 309 U.S. 470 (1940).

Background

2. In the NPRM, the Commission considered the Petition For Rulemaking of Valley Broadcasting, Inc. ("Valley") requesting the reallocation of Channel 279C from Atlantic to Glenwood, Iowa, and the modification of Station KXKT's license to specify Glenwood as its community of license. Valley demonstrated that the reallocation of Channel 279C was in the public interest and that the community of Atlantic, Iowa, would not be deprived of its sole local aural transmission service, since AM station, KJAN, would remain licensed to Atlantic. See, NPRM at ¶2.

3. In addition, Valley identified five FM channels which could be allotted to the community of Atlantic, Iowa, should the Commission desire to allot a replacement FM channel to that community. See NPRM at n. 1. None of these channels are mutually-exclusive with Valley's proposed operation of KXKT on Channel 279C at Glenwood, Iowa.¹

4. On the deadline for filing Comments in this proceeding, Wireless submitted its "Comments and Counterproposal." Wireless did not object to the reallocation of

¹ In the NPRM, the Commission noted Valley's comments with respect to the five alternative channels and stated that the replacement of an existing station with a vacant allotment did not obviate the disruption caused by the removal of the operating station. NPRM at n. 1. However, since Valley did not specifically request that one of the alternative channels be allotted to take the place of Channel 279 and apparently since no expression of interest had been filed, the Commission took no action in response to Valley's comments.

Channel 279C to from Atlantic to Glenwood. Instead, Wireless merely stated that "...the effect of (Valley's Petition For Rulemaking) on existing service must be considered and, for that reason, it is filing these Comments and Counterproposal." Wireless Comments and Counterproposal at p. 2. Wireless argued that Atlantic, Iowa, deserved to retain its own FM station but, rather than opposing the reallocation of Channel 279C to Glenwood, Wireless requested that the Commission allot a new Channel 239C3 to Atlantic.² Wireless concluded that "[S]uch a result can be accomplished in the context of this proceeding, while still allowing Valley to achieve what it has requested." Wireless Comments and Counterproposal at p. 2.

Wireless' Filing Is Not a Counterproposal

5. Wireless's "Counterproposal" is defective because it is not mutually-exclusive with any other proposal in this proceeding. Therefore, it is not a bona fide Counterproposal and it should have been filed as a separate "Petition For Rulemaking." If it were filed as Petition For Rulemaking, Wireless' proposal to allot Channel 239C3 to Atlantic would have been the subject of a separate Notice of Proposed Rulemaking. Realizing that a proposal for a new FM allotment at Atlantic, Iowa, may meet with a certain amount of opposition and/or competing counterproposals, Wireless has tried to employ a method to have its proposal considered while avoiding mutually-exclusive filings. By filing what it claimed is a "Counterproposal" in this proceeding, Wireless must have realized that its Counterproposal, if accepted, would be subject only to additional reply comments and that its Counterproposal would be protected (or "cut-off") from additional

² Wireless is the licensee of the remaining AM station in Atlantic - KJAN.

counterproposals. See, Availability of FM Broadcast Assignments, 5 FCC Rcd 931, 932-3, n. 4 (1990). Given this fact, it was to Wireless' advantage to file a Counterproposal in this proceeding and avoid any such hostile filings.

6. The Commission has defined "Counterproposal" as "a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made." Availability of FM Broadcast Assignments, 5 FCC Rcd at 933, n. 5 (emphasis added). Since Wireless' proposal is not mutually exclusive with Valley's proposed reallotment of Channel 279C to Glenwood, Wireless' filing is not acceptable for filing as a counterproposal under the Commission's definition. The Commission should strike Wireless' filing as a defective Counterproposal. Wireless could resubmit its proposal as a Petition For Rulemaking. See, FM Table of Allotments (Canovanas, PR, et. al), 7 FCC Rcd 3324, n.3 (1992).³

Conclusion

7. Wireless' filing is not a mutually-exclusive Counterproposal and it should not be treated as such in this proceeding. If the Commission accepts Wireless' proposal in this proceeding, then the public will not have the benefit of the full range of comment that the Commission intended in such cases. The correct response should


³ In the Canovanas, PR case there was no need to return the defective counterproposals, since the Commission had to issue a Further Notice of Proposed Rulemaking to further consider the original rulemaking proposal and, as such, a full range of public comment on the counterproposals would have been permitted. Id. In this case, there is no need for a Further Notice of Proposed Rulemaking, and, therefore, it would appear that return of Wireless' Counterproposal would be the proper outcome.

be to strike Wireless' Counterproposal and return it to Wireless, without prejudice to Wireless' re-filing it as a separate Petition For Rulemaking.

WHEREFORE, the above-facts considered, Stephen O. Meredith hereby respectfully requests that the "Comments and Counterproposal" of Wireless Communications Corp. filed in MM Docket No. 94-122 be **STRICKEN** and given no consideration in this proceeding and returned to Wireless as unacceptable for filing.

Respectfully submitted,

STEPHEN O. MEREDITH

By: 

Gary S. Smithwick
Shaun A. Maher

His Attorneys

SMITHWICK & BELENDIUK, P.C.
1990 M Street, N.W.
Suite 510
Washington, DC 20036
(202) 785-2800

April 3, 1995

CERTIFICATE OF SERVICE

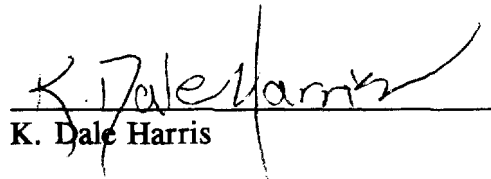
I, K. Dale Harris, a legal assistant in the law firm of Smithwick & Belendiuk, P.C., certify that on this 3rd day of April, 1995, copies of the foregoing were mailed via first class mail, postage pre-paid, to the following:

Ms. Leslie K. Shapiro (*)
Allocations Branch
Policy and Rules Division
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W.
5th Floor
Washington, D.C. 20554

John M. Pelkey, Esq.
Susan H. Rosenau, Esq.
Haley, Bader & Potts
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
Counsel for Valley Broadcasting, Inc.

Barry A. Friedman, P.C.
Semmes, Bowen & Semmes
Suite 900
1025 Connecticut Avenue
Washington, DC 20036
Counsel for Wireless Communications Corp.

(*): By Hand Delivery


K. Dale Harris